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No. 01-857

Supreme Court, U.S.
F I L E D
JAN 24 2002

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

CALVIN WHITE,

Petitioner,

v.

ORMET PRIMARY ALUMINUM CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6, respondent Ormet Primary Aluminum Corporation states that it is a subsidiary of Ormet Corporation, a privately held company, and that no publicly held company owns more than 10% of its stock.

TABLE OF AUTHORITIES

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BRIEF IN OPPOSITION

Petitioner asserts that this case implicates a circuit split on whether a plaintiff bringing a Title VII retaliation claim must prove that an "*ultimate*" employment decision has occurred, or whether proving an "*adverse*" employment decision is enough. That assertion is incorrect. Even assuming that the alleged split is more than merely semantic, it is not implicated here. The courts below did not dismiss petitioner's retaliation claims for lack of an *ultimate* employment decision, but rather for lack of even an *adverse* employment decision made in retaliation for protected activity. Thus, this case does not present the question whether a Title VII retaliation plaintiff need show an ultimate (as opposed to an adverse) employment decision. And the lower courts' conclusion that this particular plaintiff failed to establish a *prima facie* case of a retaliatory adverse employment decision presents nothing more than a factbound application of settled law. Accordingly, the petition should be denied.

COUNTERSTATEMENT OF THE CASE

This is a straightforward employment dispute. Petitioner, an African-American, began working at Ormet's alumina plant in Burnside, Louisiana, in 1989. Pet. App. 2. In January 1995, after failing a basic reading skills test, he was denied a promotion to supervisor. Petitioner thereafter filed a charge with the Louisiana Commission on Human Rights and the federal Equal Employment Opportunity Commission, alleging that Ormet had discriminated against him based on race "by failing to notify him of subsequent openings for a supervisor and by not allowing him to retake the reading skills test." *Id.* at 3.

More than two years later, in September 1997, Ormet fired petitioner after a supervisor found him asleep on the job on his overnight shift. *Id.* at 13-14. The local union challenged the discharge on petitioner's behalf, and an arbitrator upheld the union's grievance on the ground that the company needed to present more than one witness to corroborate its accusation of sleeping. *Id.* at 14. Accordingly, the arbitrator awarded petitioner reinstatement with full back pay and benefits. *Id.* Petitioner, however, declined reinstatement. *Id.*

Instead, petitioner brought this action alleging racial discrimination and retaliation in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000(e) *et seq.* In particular, petitioner alleged that Ormet had retaliated against him for filing his 1995 discrimination charge by (1) denying him overtime opportunities, (2) placing him in the company's Absenteeism Control Program, and (3) ultimately firing him. The district court (Lemmon, J., M.D. La. by designation) granted summary judgment in Ormet's favor. Pet. App. 1-15.

The court began by setting forth the law governing Title VII retaliation claims. As the court noted, "Title VII provides, in relevant part, that '[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has made a charge . . . under this subchapter.'" *Id.* at 7 (quoting 42 U.S.C. § 2000e-3(a)). The

court then explained that "[t]he burden-shifting structure applicable to discrimination claims is also applicable to unlawful retaliation claims," and that "[t]o establish a *prima facie* case for unlawful retaliation, [petitioner] must prove that [1] he engaged in activity protected by Title VII, [2] an adverse employment action occurred, and [3] there was a causal link between the protected activity and the adverse employment action." Pet. App. 7.

With respect to petitioner's first retaliation claim (retaliatory reduction of overtime), the court concluded that petitioner "failed to establish a *prima facie* case that he was deprived of overtime in retaliation for filing his grievance." *Id.* at 10. The court explained that petitioner's allegations were "conclusory," and that he "has offered no evidentiary support for [his] contentions." *Id.* Accordingly, the court held that petitioner had not established a retaliatory "adverse employment action," and that Ormet was thus entitled to summary judgment on this claim. *Id.* at 11.

With respect to petitioner's second retaliation claim (retaliatory placement in the Absenteeism Control Program), the court concluded that petitioner failed to establish that he was placed in the Program in retaliation for filing his grievance. *Id.* at 11-12. The court noted that petitioner was placed in the Program because of unexcused absences, and that in any event Ormet "gave all employees, including [petitioner], a clean slate with regard to absenteeism" during the relevant period. *Id.* at 12. Accordingly, the court held that petitioner had not established a retaliatory "adverse employment action," and that Ormet was thus entitled to summary judgment on this claim too. *Id.*

With respect to petitioner's third retaliation claim (retaliatory discharge), the court concluded that "there is no evidence that the management team discharged [petitioner] based on his race or in retaliation for filing grievances." *Id.* at 13. The court noted that "[i]t was the company's firm policy to discharge any employee caught sleeping," and that the

arbitration gave petitioner "the relief he sought . . . when he was reinstated to his former job with seniority rights and awarded back pay plus loss of any other benefits." *Id.* at 14-15. Accordingly, the court held that petitioner had not established a retaliatory "adverse employment action," and that Ormet was also entitled to summary judgment on this claim. *Id.* at 14.

The Fifth Circuit, in an unpublished *per curiam* opinion, affirmed "for essentially the reasons stated by the trial court." *Id.* at 17.

REASONS FOR DENYING THE WRIT

THE LOWER COURTS CORRECTLY APPLIED SETTLED LAW.

A. This Case Does Not Implicate the Circuit Split Alleged by Petitioner.

Petitioner's main argument is that "the United States Court of Appeals for the Fifth Circuit has incorrectly interpreted 42 U.S.C. § 2000e-3 to encompass only 'ultimate employment decisions' as retaliatory acts actionable under Title VII," Pet. i (citing *Mattern v. Eastman-Kodak Co.*, 104 F.3d 702 (5th Cir. 1997), and that this interpretation has given rise to a split among the circuits, Pet. 7-27. This argument, however, misses the point. The lower courts here did not dismiss petitioner's retaliation claims for failure to establish an "ultimate" employment decision; rather, the courts dismissed those claims because petitioner failed to establish even an "adverse" employment decision made in retaliation for protected activity. Pet. App. 8-15. Accordingly, this case simply does not implicate the circuit split alleged by petitioner.

It is true, as petitioner notes, that the Fifth Circuit has stated that a Title VII plaintiff cannot state a retaliation claim without alleging an "ultimate employment decision." *See Mattern*, 104 F.3d at 707 (citing *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1995)). But the *Mattern* court appeared to view that standard as equivalent to the "adverse employment decision" standard. "Hostility from fellow employees, having tools

stolen, and resulting anxiety, without more, do not constitute ultimate employment decisions, *and therefore are not the required adverse employment actions*." 104 F.3d at 707 (emphasis added). Read in context, thus, it does not appear that *Mattern* requires Title VII retaliation plaintiffs to establish an "ultimate employment decision" *over and above* an "adverse employment decision."

It is perhaps not surprising, thus, that the lower courts in this case did not dismiss any of petitioner's three retaliation claims for failure to allege an "ultimate employment decision." At least two of those claims (retaliatory reduction of overtime and retaliatory placement in the Absenteeism Control Program) would appear not to involve "ultimate employment decisions," but that is not why they were dismissed; rather, those claims (like petitioner's retaliatory discharge claim) were dismissed because petitioner simply failed to establish that he was subjected to an adverse employment decision in retaliation for protected activity. Indeed, neither the term "ultimate employment decision" nor a citation to the *Mattern* case is anywhere to be found in the decisions below.

Even in those circuits that have specifically held that a Title VII retaliation claim need not involve an "ultimate employment decision," thus, petitioner would still lose. In all of those circuits, a Title VII retaliation plaintiff must still establish that he or she was subjected to an "adverse employment decision" for engaging in protected activity. *See, e.g., Von Gunten v. Maryland*, 243 F.3d 858, 863 (4th Cir. 2001); *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1455-56 (11th Cir. 1998). Because petitioner has failed to meet even this threshold standard, resolution of the alleged circuit split would have no impact on the outcome of this case.

In any event, the circuit split alleged by petitioner appears to be largely semantic, because the "practical differences" between "ultimate" and "adverse" employment decisions "are difficult to discern." *Von Gunten*, 243 F.3d at 864. Notwithstanding the labels used, all circuits recognize that

"'there is some threshold level of substantiality that must be met for unlawful discrimination to be cognizable under the anti-retaliation clause.'" *Id.* (quoting *Wideman*, 141 F.3d at 1456). Thus, for example, the Eighth Circuit has expressly adopted the "ultimate employment decision" standard, *see, e.g., Ledergerber v. Stangler,* 122 F.3d 1142, 1144 (8th Cir. 1997), but has applied that standard broadly to encompass any "tangible change in duties or working conditions that constituted a material employment disadvantage," *Manning v. Metropolitan Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997); *see also Kim v. Nash Finch Co.*, 123 F.3d 1046, 1060 (8th Cir. 1997). Similarly, the Fifth Circuit has held that "ultimate employment decisions" encompass such decisions as the denial of a pay raise or paid leave, and the discontinuation of a stipend. *See, e.g., Fierros v. Texas Dep't of Health*, 274 F.3d 187, 193-94 (5th Cir. 2001); *Mota v. University of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512, 521 (5th Cir. 2001); *Rubinstein v. Administrators of Tulane Educ. Fund*, 218 F.3d 392, 402 (5th Cir. 2000). It is far from clear, thus, that the circuit split alleged by petitioner (but not implicated by this case) is anything but semantic.

B. The Lower Courts Correctly Held That Petitioner Failed To Establish a *Prima Facie* Case of Retaliation.

Petitioner also asserts that the lower courts erred by granting summary judgment in Ormet's favor when "the *evidence* shows that [petitioner] suffered actionable harassment under 42 U.S.C. § 2000e-3 due to his being verbally harassed by members of Ormet's management, being forced to work jobs others in his position were not forced, being unfairly placed on Ormet's absenteeism program and ultimately terminated for allegedly sleeping on the job." Pet. 7 (emphasis added). Needless to say, this Court is not in the business of reviewing the sufficiency of the evidence underlying a particular claim. The lower courts here correctly concluded that petitioner failed to present sufficient evidence to establish a *prima facie* case of

retaliation on any of his three claims, and petitioner presents no reason for this Court to revisit that factbound conclusion.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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